(4)

No 09-35

IN THE

# Supreme Court of the United States

GENERAL MANUEL ANTONIO NORIEGA,

*Petitioner,*

*v*

GEORGE PASTRANA,

*Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR REHEARING


FRANK A RUBINO
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 858-5300

JON MAY
*Counsel of Record*
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 373-3740

*Counsel for Petitioner*



228104

COUNSEL PRESS
(800) 274 3321 • (800) 359 6859

## QUESTION PRESENTED

Whether as a consequence of the government's release of the petitioners in *Kiyemba v Obama*, No 08-1234, review in this case is warranted to determine whether the limitations placed on habeas review by Section 5 of the Military Commissions Act (2006) constitute a suspension of the writ, whether the Geneva Convention relative to the treatment of prisoners of war (GC III) is self-executing, whether detainees held as enemy combatants are entitled to protection under Article 5 or common Article 3 (GC III), and whether such persons are entitled to immediate repatriation upon the cessassion of hostilities, providing guidance needed by the lower courts considering habeas petitions by detainees

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## ARGUMENT

**As A Consequence Of The Government's Release Of The Petitioners In *Kiyemba v. Obama*, No. 08-1234, Review In This Case Is Warranted To Determine Whether The Limitations Placed On Habeas Review By Section 5 Of The Military Commissions Act (2006) Constitute A Suspension Of The Writ, Whether The Geneva Convention Relative To The Treatment Of Prisoners Of War (GC III) Is Self-Executing, Whether Detainees Held As Enemy Combatants Are Entitled To Protection Under Article 5 Or Common Article 3 (GC III), And Whether Such Persons Are Entitled To Immediate Repatriation Upon The Cessassion Of Hostilities, Providing Guidance Needed By The Lower Courts Considering Habeas Petitions By Detainees**

With the release of the petitioners in *Kiyemba v Obama*, No 08-1234, it unlikely that this Court will determine the scope of review permitted by 28 U S C §2241 anytime in the near future Consequently, district courts considering as many as 200 habeas petitions will be forced to determine factual questions under a fog of uncertain constitutional jurisprudence Unless this Court acts now to say "what the law is" *Boumediene v Bush*, 553 U S __, 128 S Ct 2229, 2259 (2008)(quoting *Marbury v Madison*, 1 Cranch 137, 177 (1803)) the innocent and the guilty alike will continue to be denied meaningful review of both the conditions of their confinement and the length of their detention

Following the events of 9-11, the government sought to hold enemy combatants without any process, a procedure found constitutionally infirm in *Hamdi v Rumsfeld*, 542 U S 507, 124 S Ct 2633 (2004) In response to this Court's determination that the Constitution required a detainee's status be determined by a "neutral decision-maker," *id* at 533, the Executive created Combatant Status Review Tribunals and Congress enacted the Detainee Treatment Act (DTA) of 2005, 119 Stat 2739 and the Military Commissions Act (MCA) of 2006, Pub L No 109-366, 120 Stat 2600, both subsequently struck down by this Court In holding these provisions to be unconstitutional, this Court left it to the lower courts to develop "the contours of the substantive and procedural law of detention" *Ghaleb Al-Bihani v Obama*, 590 F3d 866, 870 (D C Cir 2010), citing *Hamdi v Rumsfeld*, 542 U S 507, 522 n 1 (2004), *Boumediene*, 128 S Ct at 2276

For as long as eight years, the United States Military has detained prisoners without any determination by a neutral decision-maker that these persons have engaged in conduct warranting their detention under United States law Indeed, two administrations have struggled with the very language used to denominate the detained, first calling some "enemy combatants" or "unlawful enemy combatants," and later "privileged enemy belligerents" or "unprivileged enemy belligerents"[1] Both the Congress and

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1 White House Memorandum, "Humane Treatment of al Qaeda and Taliban Detainees" (February 7, 2002), *available at http //www washingtonpost com/wp-srv/nation/documents/020702bush pdf*, denying both Taliban and Al Qaeda, Prisoner of War status, and denominating both "unlawful enemy combatants," Military Commissions Act of 2009, Pub L No 111-84, 10 U S C §948a (6) and (7)

the Executive have failed to provide a means to adjudicate the status of detainees that passes constitutional muster, and that failure has been exacerbated by this Court's practice of deferring ruling on constitutional questions until the issues have been exhaustively addressed by the lower courts, a practice that may serve the national interests in most instances, but has not here As Judge Brown recently observed in his concurrence in *Al-Bihani*

> The common law process depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts, which in turn enjoy the luxury of time to work the doctrine supple None of those factors exist in the Guantanamo context

*Id* at 881

It is true that this Court has not left the political branches entirely at sea In *Boumediene* this Court described the topology of the guarantees granted habeas petitioners by the Constitution Thus, a detainee must be granted a "meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law *St Cyr*, 533 U S , at 302, 121 S Ct 2271 " *Id* at 2266 To that end, the detainee must be afforded a "a full and fair opportunity to develop the factual predicate of his claims " *Id* at 2273 [2] Moreover, "the habeas court must

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2 The Military Commission Act of 2009, Pub L 111-84, codified at 10 U S C §948 et seq , purports to provide the (Cont'd)

have the power to order the conditional release of an individual unlawfully detained-though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted." *Id.* at 2266. But what standards govern those determinations?

In this Petition, this Court is directly confronted with determining "the content of the law that governs" the detention of prisoners of war, a question left unanswered by *Boumediene*, 128 S. Ct. at 2274 ("In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.") More specifically, review would determine whether Congress has the authority to "eliminate the Geneva Convention as a source

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(Cont'd)

procedural protections constitutionally required in the trial of unprivileged enemy belligerents. The MCA requires that charges be served upon the accused in a "language that the accused understands" and "sufficiently in advance of trial to prepare a defense." §948s. It guarantees the right of the accused to present evidence in his defense, cross-examine the witnesses against him, and examine and respond to all evidence admitted against him. §949a(b)(2)(A). It further provides for compulsory process to obtain evidence from any location where the United States has jurisdiction. §949j. But these guarantees may be more illusory than real. First, the rules permit the introduction against the defendant of hearsay testimony which the accused may have no way to confront. §949a(b)(3)(D). Second, much of the evidence that may be needed by the defense will not be available since it will be located in territory outside the jurisdiction of the United States. The result may be a conviction based entirely upon hearsay that the accused was both unable to confront for lack of cross-examination and unable to rebut for lack of access to witnesses or evidence.

of rights upon which §2241 petitioners may rely" *Noriega v Pastrana*, No 09-35, dissent by Justice Thomas, slip, op , at 8 This is a question of vital importance to those district courts considering petitions by detainees challenging the conditions of confinement as well as those courts considering petitions by detainees seeking their release and repatriation As Justice Thomas pointed out, review of this Petition would necessarily answer three questions that have confronted the lower courts first, whether the Geneva Conventions are self-executing, second, whether federal courts may classify detainees as POWs under the Third Convention, and finally, whether the United States is required to immediately repatriate detainees after hostilities have ceased *Id* at 14

If the Geneva Convention is self-executing, and if §5 MCA violates the Suspension Clause, Art I, §9, then the district court is "a competent tribunal" entitled to determine the status of the prisoner, under Article 5, GCIII *See e g United States v Noriega*, 808 F Supp 791, 803 (S D Fla 1992) (holding that the court was a competent tribunal as required by the Geneva Convention and declaring that General Noriega was a prisoner of war) The court will then be able to determine if the detainee is subject to trial by Military Commission pursuant to 10 U S C §948b(a)(establishing the procedures for the use of military commissions to try unprivileged enemy belligerents for violations of the laws of war) If the court determines that the detainee is a privileged enemy belligerent—a prisoner of war under Art 5, GCIII—the detainee would not be subject to trial under the MCA (2009), instead he would be entitled to immediate repatriation upon the cessation

of hostilities, Art 118, GCIII, or the completion of a sentence under some other provision, Art 119, GCIII In either event the court would have the authority to order the release of the detainee pursuant to the Geneva Convention If the Court determines that the detainee is an unprivileged enemy belligerent, the court will still have the power to insure that the detainee is treated in accordance with the protections guaranteed by Common Art 3, GCIII

Our government's policies toward persons detained in the war on terror have been a failure

> [T]he administration's decision to proceed with military commissions as the best way to adjudicate their crimes against the United States has wreaked havoc with the United States' fight against international terror and has eroded American leadership in other areas throughout the world The ambiguity surrounding the status of detainees, as compared to established global norms for dealing with traditional prisoners of war (POWs), has also lead to widespread cynicism, both domestically and internationally, about the true mission of the facility Questions have been constantly raised about whom we are detaining, whom we might detain in the future, and what kind of oblique justice will be applied to them

Glenn Sulmasy, The National Security Court System, p 4 (Oxford, 2009) As this Court observed in *Boumediene*, "Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention Their access to the writ is a

necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek." 128 S Ct at 2275. In response this Court expedited the review of habeas petitions dispensing with the requirement for exhaustion. *Id.* Despite this Court efforts, the proceedings before the district courts remain bogged down as the courts grapple with legal issue that remain.[3] As Justice Thomas has argued, regardless of how this Court were to rule upon General Noriega's petition, it is in the national interests for this Court to provide "the political branches a clearer sense of the constitutional limits to which new legislative or policy initiatives must adhere." (Justice Thomas dissent, slip, op., p. 14). It is of even more pressing importance for the lower courts to know precisely what law applies to detainees so that they can promptly adjudicate the claims before them. Ultimately resolution of the questions presented herein is in the interests of all parties, the courts, the detainees, and the United States.

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3. In *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated and dismissed as moot in Al-Marri v. Spagone*, 129 S. Ct. 1545 (U.S. 2009), the Fourth Circuit held that as a result of the this Court's decision in *Boumediene* the district court had jurisdiction to consider a *habeas* petition on behalf of Ali Saleh Kahlah al-Marri, an alien arrested in the United States and detained as an enemy combatant but found little agreement as to the scope of activity making a person an "enemy combatant." In *Khalid v. Bush*, the district court held that the Geneva Convention was not self-executing. 355 F. Supp. 2d 311, 326 (D.D.C. 2005), *vacated and dismissed sub nom. Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd Boumediene v. Bush*, 553 U.S. __, 128 S.Ct. 2229 (2008). In *Hamden v. Rumsfeld*, the district court disagreed holding that the Geneva Convention applied to the entire Afghan theater of conflict. 344 F. Supp. 2d 152, 161 (D.D.C. 2004), but this holding was reversed by the D.C. Circuit Court of Appeals, 415 F.3d 33 (D.C. Cir. 2005), *rev'd* 548 U.S. 557 (2006).

## CONCLUSION

The petition for certiorari should be granted and General Noriega repatriated to Panama pursuant to the Geneva Convention

Respectfully submitted,

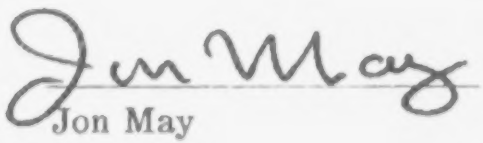
FRANK A. RUBINO
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 858-5300

JON MAY
*Counsel of Record*
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 373-3740

*Counsel for Petitioner*

## CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44 2 of the Rules of the Supreme Court and is presented in good faith and not for delay



Jon May